

A Constitutional Framework for Indigenous Governance

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Abstract

This article argues that there needs to be a conceptual shift in how we understand the constitutional framework of government in Australia. Fundamental to this shift is an understanding that Indigenous governance exists and is practiced at various levels in the Australian polity, and that the formal institutions of the Australian state already accommodate Indigenous governance in various forms, albeit implicitly. Australia's experience of federalism means that it is well placed to make this shift in understanding. The shift must occur as Commonwealth and state Indigenous policies are, ultimately, only as strong as the framework of governance that supports them.

1. Introduction

In 2005, the Federal Government implemented a new Indigenous policy, abolishing the Aboriginal and Torres Strait Islander Commission (hereafter ATSIC), and transferring to mainstream government departments the responsibility for the delivery of services to Indigenous communities. The *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (hereafter *ATSIC Act*) established an Indigenous governance structure through which Indigenous representatives played a key role in Commonwealth Government decisions about service delivery and resource allocation to Indigenous communities. ATSIC was made up of national and regional representatives chosen through a system of elections.¹ This organisational structure was an express recognition that decision-making about government services to communities

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¹ The system of electing representatives under the *ATSIC Act* was introduced in 1990. For an analysis of ATSIC and its representative structure prior to its abolition, see the Department of Immigration, Multicultural and Indigenous Affairs, *In the Hands of the Regions – A New ATSIC: A Report of the Aboriginal and Torres Strait Islander Commission* (2003) (hereafter *In the Hands of the Regions*). See also the Senate Select Committee on the Administration of Indigenous Affairs, *After ATSIC – Life in the Mainstream?* (2005). This inquiry, initiated by the Australian Democrats in the Senate, was highly critical of the decision to abolish ATSIC.

required the involvement of Indigenous peoples at the highest levels. The current policy abolishes this system of representation and avoids any mention of Indigenous governance. Instead, the current policy follows the Federal Government's guiding principle of 'practical reconciliation', which advocates a focus on practical measures to alleviate Indigenous disadvantage. The article argues that to achieve practical results, government policies must consider how best to facilitate the inevitable exercise of Indigenous governance at the national, regional and local levels. ATSIC was one attempt at such facilitation. In the face of the abolition of ATSIC, this article draws attention to the continuing importance of Indigenous governance in Australia's constitutional framework.

The article emphasises a distinction between the formal constitutional arrangements for government and their practical implementation. The distinction is captured, broadly, in the difference between government and governance. The article does not focus on the need for a formal recognition of Indigenous government within the Constitution, although this may be an important part of any strategy to ensure Indigenous governance is properly accounted for in government law and policy. Instead, the article makes a case for law makers to recognise that Indigenous governance is already a constitutional reality in Australia and, as such, that it must be accounted for in developing laws to protect and maintain Indigenous social, cultural, and political rights. The argument is based on a broad concept of Australia's constitutional framework. It is concerned with how the relationships between groups and institutions operate within the laws of the nation, and not only how the Commonwealth Constitution implements a formal framework for those laws.

The article draws on two theoretical arguments and one practical argument to substantiate the claim that Indigenous governance needs to be taken seriously as a part of the constitutional framework of the Australian state. First, the article draws on the theory of legal pluralism. Legal pluralism rejects the formal hierarchy of legal relations derived from a single authority. As a theoretical approach to the place of law in society, it focuses on the practical reality that society is constituted of co-existing communities with allegiances to laws other than those of the central government.² It argues for the formal legal system to reflect the normative relations that develop in the interaction of the different laws, customs and systems of governing of these communities. Second, the article argues that the political legitimacy of the society as a whole is enhanced when the political integrity of different social groups within the society is recognised. The article draws on a strand of liberal and communitarian philosophy, which makes the case for formally recognising community, as well as individual interests in the political framework of the state. Third, the article accepts that, in practical terms, supporting the governance mechanisms of different groups in society is, in itself, a measure to improve the social and economic conditions of those groups. This was a key finding of the Harvard Project on American Indian Development which identified

² On the theory of legal pluralism, see generally, John Griffiths, 'What is Legal Pluralism' (1986) 24 *JLP* 1. See also William Connolly, *The Ethos of Pluralization* (1995).

the quality of governance structures as one of the key indicators for successful development and economic well-being within Indigenous communities.³

In Part 2, the article explains the concept of 'Indigenous governance' as it is used in the article, and how the treatment of Indigenous governance differs from the work of others writing on Indigenous rights. In particular, it explains how the focus on 'governance' differs from a focus on sovereignty, self-government and self-determination. In Part 3, the article discusses how Indigenous governance relates to the concept of federalism, which is a mechanism for sharing political power already recognised in the Australian Constitution. In Part 4, the article demonstrates how Indigenous governance is already an important consideration, albeit implicitly, in the development of government law and policy, and in the determination of Australia's formal legal framework in the courts. The problem is that recognition occurs only in response to specific claims or when the formal constitutional arrangements fail to achieve the desired recognition of Indigenous rights. In Part 5, the article describes the theoretical case for formal recognition of Indigenous governance, drawing on theorists from political liberalism. In Part 6, the article identifies key issues for which the state must take some responsibility to ensure the effective exercise of Indigenous governance; namely, processes for determining membership of Indigenous communities, mechanisms for resolving disputes within Indigenous communities, and adequate control of resources.

2. *The Concept of Indigenous Governance*

In defining Indigenous governance, 'governance' needs to be distinguished from 'government'. Etymologically, governance and government come from the Greek verb 'to pilot or steer',⁴ and both terms refer to systems of organisation. Government, as I use it, refers to official institutions established under the Constitution of the nation.⁵ Governance has broader connotations. Michel Foucault described governance as 'the conduct of conduct'.⁶ Mitchell Dean has interpreted this to be describing 'the more or less deliberate attempts by all sorts of bodies and actors to shape the behaviour of themselves and others in complex ways'.⁷ In the context of theories of third world development, Göran Hydén provides a similar definition for governance, focusing on control over the making

3 Stephen Cornell, Catherine Curtis & Miriam Jorgensen, 'The Concept of Governance and its Implications for First Nations', *Joint Occasional Papers on Native Affairs*, No 2004-02: <http://www.jopna.net/pubs/jopna_2004-02_Governance.pdf> (24 July 2006). The Harvard Project on American Indian Economic Development (hereafter the 'Harvard Project') was founded by Stephen Cornell and Joseph Kalt at Harvard University in 1987. The Project aims to understand and foster the conditions under which sustained development can be achieved among American Indian nations.

4 Anne Kjær, *Governance* (2004) at 3.

5 Similarly, Anne Kjær distinguishes government from governance on the grounds that government was limited to 'the exercise of power by political leaders'. *Id* at 1.

6 Michel Foucault, 'The Subject and the Power' in Hubert Dreyfus & Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (1982) at 220-221.

7 Mitchell Dean, 'Notes on the Concept of Governance' presentation at Macquarie University, 11 August 2005.

of political rules: 'governance is the stewardship of formal and informal political rules of the game. Governance refers to those measures that involve setting the rules for the exercise of power and settling conflicts over such rules'.⁸ As such, governance can be applied to the regulation of a wide range of entities, including countries, organisations, communities and even individuals, as is evident in its use in 'self-governance', 'community governance', 'corporate governance' and 'global governance'.

In a study of the many uses of the term 'governance', Anne Kjaer has noted that common to all uses of governance is a 'focus on institutions and institutional change'.⁹ One of the attractions of the concept of 'governance' in the context of Indigenous political rights is that its distinction from government in itself suggests a concern with institutional change, and with improving the accountability of mainstream government through a broader focus on its interactions with social and cultural communities as autonomous political entities. Jan Kooiman usefully divides governance into three modes: self-governance, co-governance and hierarchical governance.¹⁰ Self-governance is 'the capacity of social entities to govern themselves autonomously'.¹¹ Co-governance means utilising organised forms of interactions, such as collaboration and co-ordination, for governing purposes. Hierarchical governance is bureaucratic government with control coming from the top. Indigenous governance relates particularly to the first two modes of governance. In terms of self-governance, the primary questions in relation to Indigenous governance are how can, and how should, the state facilitate the autonomy and effectiveness of Indigenous governance in the relationship between Indigenous communities and mainstream government? Co-governance is reflected in some of the mechanisms for the interaction between Indigenous communities and the state such as, in the native title context, Indigenous Land Use Agreements (ILUAs).

Paul McHugh describes the emergence of Indigenous governance as a stage in the development of Indigenous claims against the state in common law countries. The 1970s and 1980s were times in which Indigenous rights were established, and the 1990s was a time when common law countries had to determine what these new rights meant for Indigenous self-determination.¹² McHugh states that the concept of 'governance' has generally been limited to describing processes internal to Indigenous communities and, in particular, how they managed their new rights for themselves.¹³ Diane Smith suggests that governance has a wider role than that attributed to it by McHugh. She points out that since the 1980s when the term first emerged, it has been transferred into bureaucratic thinking and government policy making without a clear articulation of its meaning.¹⁴

8 Göran Hydén, 'Governance and the Reconstitution of Political Order' in Richard Joseph (ed), *State, Conflict and Democracy in Africa* (1999).

9 Kjaer, above n4 at 7.

10 Jan Kooiman, *Governing as Governance* (2003) at 77–132.

11 Id at 78.

12 Paul McHugh, *Aboriginal Societies and the Common Law* (2004). McHugh's analysis is of Indigenous peoples in North America and Australasia.

13 Id at 427–428.

According to Smith, 'governance' has also been incorporated into the Indigenous policy agenda, taking a place alongside 'self-determination', 'self-government' and 'sovereignty'.¹⁵

Evidently, 'governance' is a term employed in many different ways and there is no consensus on its scope when employed to describe the political aspirations of Indigenous Australians. In this article, Indigenous governance is used to refer to the decisions Indigenous communities make individually or collectively about how they might govern themselves regardless of their formal rights. Indigenous governance describes the way Indigenous peoples observe and practice their own laws independently of any obligations they have under mainstream law. It is also about how Indigenous people negotiate the intersection of their own laws and the rights and obligations they have under the central legal system. So defined, the article suggests that Indigenous governance has been a live constitutional issue from the time of first European settlement in Australia. At the same time, the article dissociates governance from the concepts of 'self-government', 'self-determination' and 'sovereignty' on the basis that its existence and scope is not dependent on the attribution of formal legal or constitutional rights. These simple ideas about Indigenous governance harbour enormous variations when applied to the circumstances of Indigenous communities as a result of differences in geography, culture, demography, and the socio-economic position of these communities.¹⁶ This article does not address these complexities in the application of the concept. It is pitched at a more abstract level, making a case for rethinking the institutions of the state and their practical operation.

One of the difficulties of any academic writing on Indigenous political rights is whether or not the existence of autonomous self-governing Indigenous communities can be assumed or needs to be established. From an Indigenous perspective, the existence of separate Indigenous societies is, of course, self-evident. From a non-Indigenous perspective, the existence of a separate society is a matter of definition to be established against a set of criteria.¹⁷ In writing about Indigenous governance, the statements of Indigenous peoples as to who they are, what are their laws and where is their country can either be accepted at face value, and the consideration of Indigenous governance move to the structural requirements for the successful co-existence of Indigenous and non-Indigenous peoples; or there can be an attempt to understand Indigenous governance from a non-Indigenous perspective to aid interaction between Indigenous and non-Indigenous peoples. In line with the latter approach the Centre for Aboriginal Economic Policy Research (hereafter CAEPR) currently has a major research

14 Diane Smith, 'Researching Australian Indigenous Governance: A Methodological and Conceptual Framework: Working Paper No 2' (Centre for Aboriginal Economic Policy Research, 2005) at 8.

15 Ibid.

16 These variations are the focus of the Centre for Aboriginal Economic Policy Research research into Indigenous community governance. See generally, Smith, above n14.

17 For example, in international law, a 'state' must have a population, a territory, a government, and the ability to engage in diplomatic or foreign relations.

project examining Indigenous community governance. The project is an ambitious attempt to establish a clear concept of governance, and to understand Indigenous community organisation and law in terms of governance. The danger of such a project is that to define Indigenous governance may be to impose external criteria on the nature of Indigenous society, and thus to limit Indigenous control over issues of governance. There may also be a danger, from a political perspective, that non-Indigenous research into Indigenous governance is viewed as a form of verification of Indigenous governance. As I discuss in Part 4, Aboriginal identity and corresponding claims to self-governance must necessarily be self-determined. The state has no role in establishing the criteria for judging the existence of Indigenous societies. The article acknowledges, however, that the state has a role in assisting Indigenous people to establish the mechanisms for determining disputes between themselves and mechanisms to assist their interactions with others. It is for this purpose that non-Indigenous research and government inquiries into Indigenous governance and customary law are of importance.

The focus on the formal recognition of Indigenous rights through the courts has meant that ‘sovereignty’ and ‘self-determination’ are the terms most commonly used to describe Indigenous community aspirations for legal and political recognition. Sovereignty is both a legal condition and a political aspiration. Legally, it is both an attribute of statehood in international law, and an expression of the supremacy of parliament in making laws.¹⁸ As a political concept, it can be asserted as the basis for political control within a state as a matter of fact, whether or not this control is recognised in law. As both a legal and a political concept, sovereignty is established as an abstract claim. It relies on (legal) declarations and (political) assertions, which might or might not marry with lived experience. Indigenous sovereignty has both a legal and a political dimension. It challenges the legal basis of the British assertion of sovereignty in Australia in 1788,¹⁹ and it expresses an allegiance to an alternative source of law.²⁰

The law’s capacity to recognise another sovereign entity is limited by the origin and extent of the law’s own authority.²¹ In the concept of native title, the law managed a limited recognition of rights derived from Indigenous law without acknowledging Indigenous sovereignty. However, native title law created a different barrier to the legal recognition of Indigenous governance. Native title is

18 These two types of sovereignty are often referred to as ‘external’ and ‘internal’ sovereignty.

19 See, for example, *Coe v Commonwealth (No 1)* (1979) 24 ALR 118; *Coe v Commonwealth (No 2)* (1993) 118 ALR 193.

20 See, for example, Mick Dodson, ‘Sovereignty’ (2002) 4 *Balayi: Culture, Law and Colonialism* 13; Marcia Langton, ‘The Nations of Australia’, speech given at the Alfred Deakin Lecture, 20 May 2001; Michael Mansell, ‘Towards Aboriginal Sovereignty: Aboriginal Provisional Government’ (1994) 13 *Social Alternatives* 16; Paul Coe, ‘The Struggle for Aboriginal Sovereignty’ (1994) 13 *Social Alternatives* 19.

21 *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 388 (Gibbs J); *Mabo (No 2) v Queensland (No 2)* (1992) 175 CLR 31–32 (Brennan J) (hereafter *Mabo*); 95 (Deane & Gaudron JJ). For a critique of the High Court’s acceptance of the Act of state doctrine, see Stewart Motha, ‘The Sovereign Event in a Nation’s Law’ (2002) 13 *Law and Critique* 311; Peter Fitzpatrick, ‘No Higher Duty: *Mabo* and the Failure of Legal Foundation’ (2002) 13 *Law & Crit* 233–252.

derived only from the laws of pre-sovereignty Indigenous communities.²² Commonly, if a native title claim fails for want of traditional connection to the land, claimants continue to maintain their claims to the land according to their laws. Some commentators have criticised the law, and the High Court in *Mabo* in particular, for side-stepping the issue of Indigenous sovereignty in its recognition of native title. Henry Reynolds argues that native title rights must find their authority in a continuing sovereignty, and once this is acknowledged, sovereignty is capable of supporting other rights recognisable in the common law such as a right to self-government.²³ It is common for claims for the recognition of Indigenous governance to begin with the substantiation of a formal legal case for recognition such as Reynolds'. This article does not rely on the substantiation of this case, though it acknowledges that the practical and political case for recognising Indigenous governance provides a powerful case for formal recognition of Indigenous government as well.

There have been attempts in the academic literature to give the concept of sovereignty a life beyond its connection to legal authority. Valerie Kerruish argues that the assertion of an exclusive non-Indigenous sovereignty in *Mabo* is only necessary because of the limited association of sovereignty with the category of colonial law. She suggests that such juridical representations of sovereignty are linked to a conservative politics.²⁴ She proposes that there is a need in Australia 'to attend to ... a fantastic and reconciliatory moment in the idea of sovereignty'.²⁵ In *Achieving Social Justice*, Larissa Behrendt explores what Indigenous Australians are referring to when they make a claim to sovereignty. She concludes that at the heart of the claim to sovereignty is a claim for 'the recognition of the uniqueness of individual identity and history'.²⁶ As such, sovereignty is not so much the basis for a claim to rights, but a claim to be freely allowed to express and live out a different form of existence. Steven Curry argues that if Indigenous peoples have a common culture and the ability to act in common, then they 'must be seen as capable of exercising sovereignty'.²⁷ Curry argues further that although this sovereignty is limited by competing interests, it entails a positive idea of 'fashioning a society that promotes one's interests'.²⁸ Brennan, Behrendt, Strelein and Williams describe sovereignty as being 'about the power and authority to govern'.²⁹ They suggest that, defined as such, it need not be limited to pre-determined abstract formulations, and that Indigenous peoples can reclaim the term. For example, the National Aboriginal and Islander Health Organisation stated in 1983:

22 *Yorta Yorta Members of the Aboriginal Community v Victoria* (2002) 214 CLR 422 at 445–447 (Gleeson CJ, Gummow & Hayne JJ).

23 Henry Reynolds, *Aboriginal Sovereignty* (1996) at 1–15.

24 Valerie Kerruish, 'At the Court of the Strange God' (2002) 13 *Law & Crit* 271 at 274.

25 *Id* at 271.

26 Larissa Behrendt, *Achieving Social Justice* (2003) at 96. See also Sean Brennan, Brenda Gunn & George Williams, '“Sovereignty” and its Relevance to Treaty-Making Between Indigenous Peoples' and Australian Governments' (2004) 26 *Syd LR* 307.

27 Steven Curry, *Indigenous Sovereignty and the Democratic Project* (2004) at 148.

28 *Ibid*.

29 Sean Brennan, Larissa Behrendt, Lisa Strelein & George Williams, *Treaty* (2005) at 71.

Sovereignty can be demonstrated as Aboriginal people controlling all aspects of their lives and destiny It is Aborigines doing things as Aboriginal people, controlling those aspects of our existence which are Aboriginal. These include our culture, our economy, our social lives and our indigenous political institutions.³⁰

Although there is significant rhetorical force in reclaiming the concept of sovereignty, its political force may be compromised by its formal legal limits. The concept of Indigenous governance avoids this problem. Taiaiake Alfred is more critical of the usefulness of the concept of sovereignty for Indigenous peoples. He argues that sovereignty ought to be abandoned as a concept to advance Indigenous claims because it is an 'exclusionary concept rooted in an adversarial and coercive Western notion of power'.³¹ There is considerable force in Alfred's critique. Reclaiming a concept which is rooted in non-Indigenous claims to ultimate legal authority is to begin a discussion of political rights from a position of profound disadvantage. The concept of 'governance' is not so specifically located and is better suited to the political claims of Indigenous peoples.

Like sovereignty, 'self-determination' and 'self-government' are linked to an official legal status. There is extensive literature on the international right of Indigenous people to self-determination, which arises under the draft United Nations Declaration on the Rights of Indigenous Peoples.³² Like sovereignty, there have been attempts to reclaim the concept of self-determination. The former ATSI Social Justice Commissioner, William Jonas, stated in 2002, '[s]elf-determination ... can be articulated through the restructuring and renewal of existing relations between Indigenous organisations and government to create arrangements to reflect and support a diversity of Indigenous circumstances'.³³ Similarly, in explaining the connotations of sovereignty, Brennan, Gunn and Williams explain how, in its broadest sense, Indigenous sovereignty is a necessary manifestation of the exercise of self-government: '[it] describes [Indigenous people's] capacity across the range of political, social and economic life'.³⁴ The concept of 'governance' does not require recognition of Indigenous sovereignty, legally or politically, to have effect. The difference here is similar to the difference between

30 National Aboriginal and Islander Health Organisation, *Sovereignty* (1983) quoted in Larissa Behrendt, above n26 at 100.

31 Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (1999) at 59.

32 United Nations Document 45/1994. For a discussion of the draft declaration, see Chidi Oguamanam, 'Indigenous People and International Law: The Making of a Regime' (2004) 30 *Queen's Law Journal* 348; Erica-Irene Daes, 'The Concepts of Self-Determination and the Autonomy of Indigenous Peoples' in the Draft United National Declaration on the Rights of Indigenous Peoples (2001) 14 *St Thomas LR* 259; Hannah McGlade, 'Not Invited to the Negotiation Table: The *Native Title Amendment Act* 1998 (Cth) and Indigenous Peoples' Right to Political Participation and Self-Determination Under International Law' (2000) 1 *Balayi: Culture, Law and Colonialism* 97.

33 William Jonas, 'Community Justice, Law and Governance: A Rights Perspective', speech given at the Indigenous Governance Conference, Canberra, 3–5 April 2002: <http://www.hreoc.gov.au/speeches/social_justice/community_justice.html> (3 May 2006).

34 Brennan et al, above n26 at 314. See also Brennan et al, above n29 at 72–74.

a constitutional doctrine of a separation of powers that, on the one hand, formally defines the relationship between the executive, the legislature and the courts and, on the other hand, describes the substantive difference in their functions. The difference in functions limits government power regardless of the formal status of the separation of powers doctrine. Likewise, Indigenous governance exists regardless of the cut and thrust of legal declaration and political recognition of self-government. While non-Indigenous courts might reject legal claims to Indigenous sovereignty, and while governments might reject the existence of Indigenous self-government for the purposes of negotiating Indigenous-specific rights, Indigenous governance continues to exist and to be practiced by Indigenous communities, and as such must be acknowledged by governments in the decisions they make about the allocation of resources to Indigenous communities.

The focus in this article on Indigenous governance instead of sovereignty and self-government is similar to the shift in thinking Noel Pearson has urged in his campaign against passive welfare. Pearson frames the problem of welfare dependence as a problem of a loss of responsibility within Indigenous communities as a result of integration into the white fella economy.³⁵ He argues that the free market economy has replaced Indigenous economies, and as the most disadvantaged people within the free market economy, Indigenous people have become dependent on others to make their way. He claims that Indigenous economies of subsistence were based on the values of responsibility and reciprocity, and that these values must be reinstated to break the cycle of welfare dependency.³⁶ Pearson uses the distinction between the market and Indigenous economies to promote particular values and to drive a particular policy response to the problem of Indigenous poverty. This article takes Pearson's distinction between Indigenous and non-Indigenous economies to a higher level of abstraction. It presents the interaction of Indigenous peoples with non-Indigenous legal and social systems as an exercise of governance. According to the framework suggested in this article, Pearson's call to 'take responsibility' could, therefore, be framed as a call to reinstate Indigenous governance.

3. *Federalism and Indigenous Governance*

In the early 1980s, John Griffiths described the existence of more than one legal order within a social field as 'legal pluralism'.³⁷ Griffiths contrasted 'strong legal pluralism', in which the different legal orders are autonomous within the same social field, and 'weak legal pluralism' in which there is a degree of diversity among social and culture groups that are all ultimately governed by a single law. Legal pluralism offers a useful framework for the discussion of Indigenous governance because it emphasises the system of laws and regulation that really governs the behaviour of groups, regardless of the formal legal position. The federal nature of the Commonwealth Constitution is an example of legal

35 Noel Pearson, *Our Right to Take Responsibility* (2000) at 13–14.

36 *Id.* at 27–31.

37 Griffiths, above n2 at 38.

pluralism. The Commonwealth and the states both have the power to make, administer and interpret the law within the same social field. However, federalism remains a weak form of legal pluralism as both arms of the federation remain components of a single legal order. Nevertheless, because of the experience of pluralism in Australia derived from the division of sovereignty between the Commonwealth and the states, there is a familiarity with sharing power and responsibility over the resources of the state at the highest level. Even at a time when the balance of power in the Australian federation seems highly skewed in favour of the Commonwealth, the Commonwealth and state governments retain individual responsibility for some policy areas, and share responsibility for others. That is, regardless of the formal interpretation of the extent of Commonwealth legislative power vis-à-vis the states, in practice the states remain vital service providers in Australia, and effective government is a joint enterprise of the Commonwealth and the states.

Federalism is most commonly associated with the arrangement of government institutions within nation-states. Federations share certain structural features, such as a distribution of legislative powers in a constitution,³⁸ a sharing of power that cannot be amended unilaterally by one sphere of government,³⁹ a degree of fiscal autonomy within each sphere of government,⁴⁰ and an independent judiciary. Some theorists attribute to federalism a broader meaning, drawing a distinction between Federal Government and federalism in order to open federalism up to a wider set of circumstances.⁴¹ Eghosa Osaghae states that federalism is a philosophy 'according to which relations between two or more groups are organised on the basis of a combination of the principles of centralisation, non-centralisation and power sharing'.⁴² Although at the level of the nation-state, the most common motivation for federating is to join separate political entities into a union, federalism can equally be a force of decentralisation. Christine Fletcher has argued, that '[o]ne of the principles of federalism is that it allows regional communities ... to determine what types of political, social, cultural and economic institutions they prefer'.⁴³ So conceived, federalism is a theory of organisation of great relevance to Indigenous governance.⁴⁴ Like the former Australian colonies, Indigenous peoples desire a national and a local identity. They desire, in Dicey's

38 In Australia, see the Commonwealth Constitution, s51 and ss106–109.

39 The Supreme Court of Canada declared this principle when considering the constitutionality of unilateral secession by Quebec. See *In the Matter of Section 53 of the Supreme Court Act, RSC, 1985, S-26* [1998] 2 SCR 217.

40 Russell Mathews, *Revenue Sharing in Federal Systems* (1980).

41 Preston King, *The Federal Solution and Federation* (1982); see also Kenneth Wheare, *Federal Government* (1963).

42 Eghosa Osaghae, 'Federalism in Comparative Perspective' (1997) 16 *Politeia* 1 at 1.

43 Christine Fletcher, *Trapped in Civil Society: Aborigines and Federalism in Australia* (1996) at 18. See also Fletcher, *Does Federalism Safeguard Indigenous Rights?* (1999); Eghosa Osaghae, 'A Reassessment of Federalism as a Degree of Decentralization' (1990) 20 *Publius: The Journal of Federalism* 83–98.

44 For the value of viewing questions of constitutionalism from the perspective of the struggles of Indigenous peoples, see James Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity* (1995).

terms, 'union' but not 'unity' with the state.⁴⁵ James Tully has also used the concept of federalism to capture the balance between dependence and independence of peoples within a single territory:

[F]ree and equal peoples [can] mutually recognise the autonomy and sovereignty of each other in certain spheres and share jurisdictions in others without incorporation or subordination. This is a form of treaty federalism.⁴⁶

Like the Australian states, the identity of Indigenous communities is territorially based. They are governed by distinct laws and they exercise a degree of autonomy from the central government. Of course, Indigenous communities approach a possible federal relationship with the Commonwealth and state governments from a very different position. For the colonies, federation was a move towards greater centralisation. Prior to federation, the colonies were recognised self-governing entities. Indigenous communities do not have official recognition of their independent status as self-governing entities. On the contrary, Australian law has disavowed this status. For Indigenous communities, then, federalism is relevant as a mechanism for recognising their self-governing status, and as a basis for decentralising.

Although federalism offers the potential for a new relationship between Indigenous communities and the Australian state, the current federal framework also serves to complicate Indigenous and non-Indigenous relationships. Under Australia's federal system, responsibility for Indigenous affairs has shifted throughout the first 100 years of federation. The states were initially solely responsible for Indigenous policy within their boundaries. In 1967, the Federal Government became an additional site for law and policy initiatives aimed at Indigenous communities.⁴⁷ In recent times there has been a high degree of cooperation between the states and the Commonwealth. There are a variety of joint bodies which control federal financial relations. The central body is the Premiers' Conference, out of which has evolved the Special Premiers' Conference and the Council of Australian Governments (CoAG). CoAG was established in 1992 to achieve 'an integrated, efficient, national economy and a single national market'.⁴⁸ In relation to Indigenous policy, CoAG has been concerned 'to get better results for people on the ground through more effective use of government expenditure. This will require governments to work together better at all levels across agencies and jurisdictions'.⁴⁹ CoAG has facilitated general policy statements regarding reconciliation and the provision of services and support to Indigenous communities. In 2002, it also established a number of projects, 'CoAG Indigenous

45 Albert Dicey, *Introduction to the Study of the Law of the Constitution* (1st ed 1885, 10th ed 1959) at 141.

46 James Tully, 'The Struggles of Indigenous Peoples for and of Freedom' in Duncan Ivison, Paul Patton & Will Sanders, *Political Theory and the Rights of Indigenous Peoples* (2000) at 52.

47 The Commonwealth Constitution was amended to enable the Commonwealth Parliament to make special laws for Indigenous Australians.

48 Martin Painter, *Collaborative Federalism* (1998) at 44.

49 Australian Government, *CoAG Indigenous Trials*: <<http://www.indigenous.gov.au/coag/about.html>> (3 May 2006).

trials', which delivered government resources directly to selected communities for various purposes.⁵⁰

This brief analysis of the evolution of federal relations generally, and in relation to Indigenous policy making in particular, highlights the difficulty of defining a coherent interface for the recognition of Indigenous governance in Australia. On the other hand, it demonstrates the potential within a federal structure to develop flexible co-operative arrangements. This is reflected in the aims of the CoAG Indigenous trials, which are directed 'to improve the way governments interact with each other and with communities to deliver more effective responses to the needs of indigenous Australians. The lessons learnt from these cooperative approaches will be able to be applied more broadly'.⁵¹

From an Indigenous perspective, having a single government with which to negotiate rights has advantages when the claim to rights is a single claim over the whole of the state. For example, in New Zealand, the treaty of Waitangi is a comprehensive agreement between the Maori peoples and the government of New Zealand. It is a compact between two governments covering the whole of New Zealand. In Canada, most treaties have been negotiated jointly with the federal and provincial governments.⁵² On the other hand, when claims are regional there may be advantages in dealing with a government operating within a narrower regional and jurisdictional base. This has occurred in Australia in relation to land claimed by the Pitjantjatjara people in the north of South Australia.⁵³ Indigenous communities need to be aware of the advantages and disadvantages of dealing with the different levels of government, and when they should be dealing with both levels simultaneously through such bodies as CoAG.

In Australia, the Commonwealth Parliament is the dominant law-making body and any valid Commonwealth legislative scheme cannot be overturned by a hostile state government.⁵⁴ Despite the pre-eminence of Commonwealth laws under s109 of the Constitution, there are still advantages in negotiating self-government arrangements directly with state governments. Most of the land over which agreements will apply is controlled by state law, including freehold titles, pastoral

50 Ibid.

51 *CoAG Communiqué*, 5 April 2002: <<http://www.coag.gov.au/meetings/050402/index.htm#reconciliation>> (16 October 2005). At Senate Estimates Committee reviews, it has been revealed that, despite regular promises, no system of evaluation has been established for these trials and that it is not clear who is responsible for creating and implementing the evaluations – separate government departments or the newly formed Office for Indigenous Policy Coordination (hereafter 'OIPC') which was established in the wake of the abolition of ATSIC. See, 'CoAG: A Black Hole of Govt Approach' *National Indigenous Times* (10 Nov 2005).

52 The Nunavut Treaty covered the eastern part of the Canadian North West Territories, was on federal land and the negotiations were with the Federal Government alone. The new territory of Nunavut came into being on 1 April, 1999 after negotiations which, according to the Canadian Human Rights Commission, began in 1971: <http://www.chrc-ccdp.ca/publications/1999_at/page8-en.asp> (9 August 2006).

53 The negotiations led to the passing of the *Pitjantjatjara Land Rights Act* 1981 (SA). See Heather McRae, Garth Nettheim, Laura Beacroft & Luke McNamara, *Indigenous Legal Issues: Commentary and Materials* (3rd ed, 2003) at 220–222.

leases, and Aboriginal and other reserve lands. Dealing with particular state governments allows for regional variations to be maintained.⁵⁵

4. Recognition of Indigenous Governance in Law and Policy in Australia

In Commonwealth and state law and policy, there already exists a degree of recognition of Indigenous governance. In this section, the article gives examples of the recognition of Indigenous governance outside of formal constitutional arrangements. The examples of mainstream recognition of governance in this section demonstrate how Indigenous governance has always been recognised in the development of Indigenous law and policy despite limitations in formal constitutional arrangements. It also shows that although there is an implicit reliance on Indigenous governance structures for the delivery of services in the government's current Indigenous policy, the failure to acknowledge this reliance means the role of Indigenous communities and organisations is left inadequately defined.

A. Recognition of Indigenous Governance in Legislation and Policy

The non-Indigenous colonisation of Australia was marked by a radical and violent disregard of the interests of Aboriginal people. This is well documented by historians of the colonial period,⁵⁶ and has also been recognised by Australian courts.⁵⁷ Importantly for the subsequent development of the institutions of government in Australia, colonisation proceeded on the premise that, for legal purposes, the continent was unoccupied and that British sovereignty and

54 For example, the *Native Title Act* 1993 (Cth) withstood a challenge to its validity by the Western Australian State government in 1995. See *Western Australia v Commonwealth* (1995) 183 CLR 373. The Western Australian State Government had passed an act which purported to extinguish native title and replace with with a statutory right. The legislation was held to be inconsistent with the *Native Title Act* 1993 (Cth) under s109 of the Constitution and therefore to be inoperative.

55 There are considerable differences in the recognition afforded to Indigenous land rights in state grants. For example, the High Court has held that pastoral leases in Qld, WA and NSW all have different impacts on native title rights. Compare *Wik Peoples v Queensland* (1996) 187 CLR 1; *Anderson v Wilson* (2002) 213 CLR 401; and *Ward v Western Australia* (2002) 213 CLR 1. There are also different ways and different extents to which Indigenous lands are protected under state legislative schemes. For example, all states except Western Australia have passed some form of land rights legislation.

56 See, for example Bain Attwood, *Telling the Truth about Aboriginal History* (2005); Henry Reynolds, *The Other Side of the Frontier: An Interpretation of the Aboriginal Response to the Invasion and Settlement of Australia* (1st ed, 1981); Lyndall Ryan, *Aboriginal Tasmanians* (1st ed, 1981); Raymond Evans, Kay Saunders & Kathryn Cronin, *Race Relations in Queensland: A History of Exclusion, Exploitation and Extermination* (1st ed, 1988).

57 Most famously in *Mabo*, above n21. In *Nulyarimma v Thompson* (1999) 165 ALR 621, Justice Crispin of the Supreme Court of the ACT provided a sweeping history of violence against Aboriginal peoples in the colonial period. Native title claims in the Federal Court have given rise to further judicial pronouncements on the impact of colonisation in regions throughout Australia. See, for example *Yorta Yorta Aboriginal Community v Victoria*, above n22 (Olney J); *Ward v Western Australia*, above n55 (Lee J).

institutions of government could be wholly imported to Australia and immediately become the sole source of legal rights within the territory.⁵⁸ This perception of the legal basis of colonisation affected the types of legal recognition afforded to Indigenous Australians.

Throughout the 20th century there were a wide range of policy responses to the presence of Indigenous peoples in Australia. Until the early decades of the century, there was a widespread belief that Aboriginal people would simply die out, removing any requirement for their special accommodation. When this did not occur, from the 1930s, state governments implemented policies of absorbing Indigenous Australians into the wider Australian community.⁵⁹ In 1937, the Commonwealth and the states agreed to a policy of absorbing all non-‘full blood’ Aboriginal people into the wider population.⁶⁰ In 1957 the policy was extended to all Aboriginal people.⁶¹ During the period of assimilation, much Aboriginal political action, and political action on behalf of Aboriginal people, was directed at the achievement of equal rights within the laws of the Commonwealth and the states. This action was symbolised most publicly in the Freedom Ride of 1965 in Western NSW,⁶² and in the pastoral workers’ strike at the Newcastle Waters and Wave Hill cattle stations in the Northern Territory.⁶³ There were also some claims for the recognition of Aboriginal government and other Indigenous-specific rights during this period, though they tended to be isolated and ultimately unrewarded.⁶⁴

From the 1970s, the state and Commonwealth governments recognised the reality of Indigenous governance through a variety of legislative mechanisms, including legislation creating Indigenous corporations,⁶⁵ land councils,⁶⁶ and local government councils.⁶⁷ States have also reserved or granted lands to Indigenous communities to provide them with the opportunity to pursue their traditional practices. Also, from the 1970s Aboriginal peoples pursued the possibility of entering a treaty or agreement with the Federal Government. There was considerable support for the idea within the Fraser Coalition Government

58 *Mabo*, above n21 at 38–42 (Brennan J), 101–103 (Deane & Gaudron JJ).

59 See generally Peter Russell, *Recognising Aboriginal Title: the Case and Indigenous Resistance to English-Settler Colonialism* (2005) at chapter 5.

60 *Royal Commission into Aboriginal Deaths in Custody: National Report* (1991) at 510. In fact, policies of removing children for the purpose of assimilation occurred much earlier than this. The Human Rights and Equal Opportunity Report, *Bringing Them Home*, concluded that in the period from 1910 to 1970, between 10–30 per cent of Indigenous children were forcibly removed from their families and communities: Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) (hereafter *Bringing Them Home*) at chapter 2. For a history of Indigenous claims and policy responses in Australia up to the 1970s, see Heather Goodall, *Invasion to Embassy: Land in Aboriginal Politics in New South Wales 1770–1972* (1996).

61 Aboriginal and Torres Strait Islander Commission, *As a Matter of Fact: Answering the Myths and Misconceptions about Indigenous Australians* (1999) at 10 (hereafter *As a Matter of Fact*).

62 See Ann Curthoys, *Freedom Ride: A Freedom Rider Remembers* (2002).

63 See, for example William Deane, ‘Some signposts from Daguragu’ (1997) 8 *Public LR* 15; Bain Attwood, ‘The Articulation of ‘land rights’ in Australia: The Case of Wave Hill’ (2000) 44 *Social Analysis* 3.

from 1975–1983, and within the Hawke Labor Government which followed. The most active treaty campaign occurred around the time of the bi-centenary in 1988. The campaign culminated in the Prime Minister committing to a treaty in a speech at the Barunga Festival in the Northern Territory, but a treaty was never concluded.⁶⁸

One of the most significant government initiatives in the 1970s was the establishment of a series of national Indigenous representative bodies, first the Department of Aboriginal Affairs and the National Aboriginal Consultative Committee (hereafter NACC) under the Whitlam Labor Government, then the National Aboriginal Conference (hereafter NAC) under the Fraser Coalition Government. In 1989, the NAC was replaced by ATSIC under the Hawke Labor Government. The *ATSIC Act* established a comprehensive governance model for Indigenous peoples, linking regions through a national representative body and, from 1999, providing a framework for determining community representation through the ATSIC election process.

The *ATSIC Act* was a direct recognition of the existence of Indigenous governance and was an attempt to enhance it through providing a legislative framework for its expression. It provided a national platform for Indigenous governance. The ATSIC Chairperson was a senior bureaucrat in the Department of Immigration, Multicultural and Indigenous Affairs (hereafter DIMIA) who commanded a media presence and had the resources to run media and education campaigns on important Indigenous issues. On the other hand, because ATSIC's representative structures, powers, and funding were all the creation of statute and relied on the financial support of the Federal Government, ATSIC was constrained in its ability to implement a more radical agenda in opposition to Commonwealth

64 In 1927, Fred Maynard wrote to the NSW Premier, Jack Lang, with a claim for land for Indigenous peoples and for control of Aboriginal affairs to be transferred to a board of management 'comprised of capable, educated aboriginals under a chairman appointed by the Government.' Letter dated 3 October 1927, reproduced in Bain Attwood & Andrew Markus, *The Struggle for Aboriginal Rights: A Documentary History* (1999) at 66–67. In 1935 Aboriginal people in South Australia requested that a Board of Management be appointed, which would include an Aboriginal representative. In 1938, a request was made of the Commonwealth Government to appoint a Commonwealth Ministry for Aboriginal Affairs. It was suggested that an advisory board of six persons, three of them Aboriginal, be established to advise the minister: see Attwood & Markus, *The Struggle for Aboriginal Rights* at 39.

65 *Aboriginal Councils and Associations Act* 1976 (Cth). A Bill to repeal this Act, the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (Cth), is currently before the Commonwealth Parliament.

66 Such as the *Aboriginal Land Rights Act* 1983 (NSW); *Aboriginal Land Act* 1991 (Qld); *Aboriginal Lands Act* 1995 (Tas); *Aboriginal Lands Trust Act* 1966 (SA); *Aboriginal Lands Act* 1991 (Vic). Western Australia does not have Aboriginal land rights legislation. For a review and discussion of these and other legislative schemes, see Frith Way with Simeon Beckett, 'Land Holding and Governance Structures under Australian Land Rights Legislation', Discussion Paper 4 in Garth Nettheim, Gary Meyers & Donna Craig, Australian Research Council Collaborative Research Project, *Governance Structures for Indigenous Australians On and Off Native Title Lands* (1998).

67 See, for example *Local Government Act* 1993 (NT); *Local Government (Community Government Areas) Act* 2004 (Qld).

Indigenous policies. There have been a number of reviews of ATSIC, including in 2002–3, a review commissioned by the Minister for DIMIA.⁶⁹ Despite this review commending the strength of many aspects of ATSIC's work, the Government decided to abolish ATSIC in 2004 and to implement an Indigenous policy focussing on service delivery rather than governance. Under the new policy DIMIA retains an important coordinating role:

The vision is of a whole-of-government approach which can inspire innovative national approaches to the delivery of services to Indigenous Australians, but which are responsive to the distinctive needs of particular communities. It requires committed implementation. The approach will not overcome the legacy of disadvantage overnight. Indigenous issues are far too complex for that. But it does have the potential to bring about generational change.⁷⁰

The current Commonwealth Indigenous policy is concerned primarily with the accountability of mainstream agencies in the efficient delivery of services:

The Government faced the facts and introduced major reforms to Indigenous affairs. Abolishing ATSIC, dealing directly with local communities through Shared Responsibility Agreements, cutting red tape and making mainstream agencies accountable, is ... the beginning of a new era.⁷¹

Although the new policy abolishes Indigenous regional governance, it continues to recognise the importance of community consultation in determining the allocation of resources. 'We will talk directly with and respond to Indigenous communities, finding flexible solutions through the principle of shared responsibility, to the problems they identify as critical to their future'.⁷² To facilitate the necessary community consultation, the new policy replaces the ATSIC Board with an unelected National Indigenous Council (hereafter NIC) to advise the Minister, and replaces ATSIC regional commissioners with representatives from government departments responsible for Indigenous programs. The representatives operate through Indigenous Coordination Centres (hereafter ICCs), which are located in the former ATSIC regions and act as 'shop

68 The most recent momentum for a treaty surrounded the work of the Council for Aboriginal Reconciliation in the 1990s. One of the chairs of the Council for Reconciliation, Patrick Dodson, advocated a treaty in a series of public lectures at this time. See, for example Patrick Dodson, 'Beyond the Mourning Gate – Dealing with Unfinished Business' (2000). Since 2000, there has been continued academic interest in the notion of a Treaty, but the political momentum seems absent at the present time. See, for example Brennan et al, above n29; Marcia Langton, Lisa Palmer, Maureen Tehan & Kathryn Shain, *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004).

69 *In the Hands of the Regions*, above n1.

70 Peter Shergold, Secretary, Department of the Prime Minister and Cabinet quoted in Department of Immigration and Multicultural and Indigenous Affairs, *New Arrangements in Indigenous Affairs* (2005): <http://www.oipc.gov.au/About_OIPC/new_arrangements.asp> (14 December 2005).

71 Senator Amanda Vanstone, Press Release (11 July 2005).

72 Senator Amanda Vanstone, *ATSIC Now History – A Better Future Ahead for Indigenous Australians* Press Release (24 March 2005).

fronts' for the delivery of services.⁷³

The current policy recognises that the decisions about allocation of resources must still be made by the Indigenous communities who are supposed to benefit from the resources. In the most part, Indigenous community input in decision making occurs through direct consultation and agreement making between government departments and communities:

In keeping with the Government's desire to engage at the community level, the new bodies [the NIC and the ICCs] are to act as the interface between communities and governments. They will help articulate community views and provide a framework for contributing to Regional Partnership Agreements. ... We want communities to tell us how they could best be represented and we are seeing diverse and flexible arrangements emerge as a consequence.⁷⁴

At the centre of the government's new approach to Indigenous policy there are two types of agreement: Shared Responsibility Agreements (hereafter SRAs) and Regional Partnership Agreements (hereafter RPAs). RPAs are designed to meet 'regional needs and priorities'.⁷⁵ The first RPA with the Ngaanjatjarra peoples in the Gibson Desert, central Western Australia was completed in August 2005.⁷⁶ SRAs are agreements with individual communities. There are currently about 1300 such agreements across Australia.⁷⁷ To date, SRAs have focused on single issues with individual communities. They have been criticised for being ad hoc and for making basic services, which are the responsibility of government to provide, the subject matter of agreements.⁷⁸ Furthermore, although the SRAs have the appearance of targeting community needs, the different levels of resources, knowledge and power between government departments and individual communities is such that communities are in a weak negotiating position.

There is a conscious shift in focus in the current policy away from the express recognition of Indigenous governance. The existence of self-governing communities capable of negotiating agreements is assumed in the policy. Also, there is no consideration given to what communities constitute a region for the purpose of entering RPAs. These assumptions beg the question, what is the framework within which communities operate, and what is the state's responsibility to facilitate this framework? It may be that the policy will only work

73 Office of Indigenous Policy Coordination: <http://www.oipc.gov.au/About_OIPC/Indigenous_Affairs_Arrangements/4Administration.asp> (14 December 2005).

74 Senator Amanda Vanstone, 'Minister Announces New Indigenous Representation Arrangements' Press Release (29 June 2005).

75 Office of Indigenous Policy Coordination: <http://www.oipc.gov.au/About_OIPC/Indigenous_Affairs_Arrangements/7IndigenousRegionalRepresentation.asp> (14 December 2005).

76 'Regional Partnership Agreements': <<http://www.indigenous.gov.au/rpa/wa/warpanov0501.pdf>> (12 December 2005).

77 The figure of 1300 communities is taken from Australians for Native Title and Reconciliation, 'Shared Responsibility Agreements – A Critique': <http://www.antar.org.au/index.php?option=com_content&task=view&id=96&Itemid=105> (9 August 2006).

78 Australians for Native Title and Reconciliation, 'Shared Responsibility Agreements – A Critique': <http://www.antar.org.au/shared_resp_agreemts.html> at 12 December 2005.

when it expressly acknowledges the authority of Indigenous communities to make decisions. If so, there may be an inevitable move back to a policy not dissimilar to the one it purports to overturn.

B. Recognition of Indigenous Governance in Case Law

A number of decisions of the Supreme Court of NSW in the early 19th century held that Aboriginal law governed certain disputes between Aboriginal peoples.⁷⁹ These cases were soon overturned in the decisions of *Attorney-General v Brown* and *Cooper v Stuart*, which held that Australia was a settled colony and that the only sovereign power in the colony was derived from the British Crown.⁸⁰ The impact of the sovereignty of the Crown was illustrated dramatically in the courts in the decision of *Milirpum v Nabalco*, in which Blackburn J held that the law did not recognise the land rights of the Yolgnu people despite the evident strength of the system of Yolgnu laws which underpinned those rights.⁸¹ Blackburn J acknowledged that the British Crown had the capacity to recognise pre-existing Indigenous property rights, but held that the relationship of the Yolgnu to their land was not based on notions of 'property' recognised in the common law or any other law.⁸²

In 1979, Paul Coe brought an action 'on behalf of the aboriginal community and nation of Australia' challenging the legal orthodoxy of *Brown* and *Cooper v Stuart*.⁸³ The Statement of Claim challenged the British Crown's sovereignty over Australia on the basis that it was 'contrary to the existing rights, privileges, interests, claims and entitlements of the aboriginal people'.⁸⁴ Although the claim failed, Jacobs and Murphy JJ acknowledged that there was uncertainty about the means by which sovereignty had entered Australia, and held that the question was justiciable. Gibbs and Aickin JJ held that the validity of the British Crown's claims to sovereignty in Australia were acts of state that could not be challenged in the courts and that Coe's claim was therefore vexatious. Jacobs J agreed with Gibbs and Aickin JJ on this point, but joined with Murphy J in dissent to hold that the High Court or the Privy Council had never finally determined whether sovereignty had entered Australia under the doctrine of settlement or conquest, and that the question was justiciable as it might affect the extent of Aboriginal rights.⁸⁵

79 See *R v Ballard or Barrett*, Supreme Court of New South Wales, Forbes CJ, 21 April 1829, published in *Sydney Gazette*, 23 April 1829; *R v Murrell and Bummaree*, Supreme Court of New South Wales, Forbes CJ, 5 February 1836, published in *Sydney Herald*, 8 February 1836; *R v Bonjon*, Supreme Court of New South Wales, Willis J, 16 September 1841, published in *Port Phillip Patriot*, 20 September 1841. See also *R v Ballard*, *R v Murrell* and *R v Bonjon* [1998] AILR 27.

80 *Attorney-General (NSW) v Brown* (1847) 1 Legge 312; *Cooper v Stuart* (1889) 14 App Cas 286.

81 *Milirpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (hereafter *Milirpum*).

82 *Id* at 272–73 (Blackburn J).

83 Section 1A of the Amended Statement of Claim in *Coe v Commonwealth*, above n19, reproduced in the judgment of Gibbs J at 120.

84 Section 3B of amended statement of claim in *Coe v Commonwealth*, above n19, reproduced in the judgment of Gibbs J at 121.

85 *Coe v Commonwealth, (No 1)*, above n19 at 136 (Jacobs J).

Mabo confirmed that British sovereignty entered the Australian territory as a consequence of occupation or settlement and that the British Crown became the sole sovereign power in the territory from the time of the assertion of sovereignty,⁸⁶ but unlike *Milirpum*, *Mabo* held that the common law in a settled colony was capable of recognising property rights that were based on a different system of laws.⁸⁷ From one perspective, *Mabo* simply recognised what was self-evident – that Indigenous peoples had pre-existing rights to land based on their own laws that required recognition by the state as a matter of law. Most Australian governments had already recognised land rights through various legislative instruments such as state and Commonwealth land rights acts, legislation creating Aboriginal reserves, and through various legislative schemes designed to protect important places and important rights of Aboriginal peoples and empowering Aboriginal organisations to purchase and invest in land. From another perspective, *Mabo* represented an important shift in the constitutional framework of government in Australia. As Justice Gummow put it in *Wik Peoples v Queensland*:

To the extent that the common law is to be understood as the ultimate constitutional foundation in Australia, there was a perceptible shift in that foundation away from what had been understood at federation.⁸⁸

The ‘shift’ Gummow J refers to here is the belated recognition that Indigenous people had pre-existing and continuing rights under their own system of laws. Implicit in the decision was a recognition of the continuance of Aboriginal law in mainland Australia.⁸⁹ The construction of native title rights in *Mabo* assumes the existence of a whole range of existing and functioning Indigenous governance arrangements. It assumes that there are distinct communities with rules for determining such things as the membership of the community, the boundaries of the community’s traditional country, and who can speak for the community in bringing an action. It also assumes that once a claim has been made, there are existing organisational structures within Aboriginal communities capable of managing native title.⁹⁰ *Mabo* is significant not only for the extent of the legal rights it recognised, but also for its acceptance of a system of Aboriginal governance that must be acknowledged and taken seriously by the law.

The distinction between the recognition of legal rights and the underlying system of laws is evident in the jurisprudence on Indigenous land rights that has followed *Mabo*. The *Native Title Act* 1993 (Cth) was intended to reflect the extent of recognition of Indigenous land rights in *Mabo*. But what it recognised was the extent of the legal recognition of Indigenous land rights, and not the system of Indigenous governance that underpins it. Focusing on native title as a question of

⁸⁶ *Mabo*, above n21 at 32–42 (Brennan J), at 95–99 (Deane & Gaudron JJ).

⁸⁷ Id at 86–95 (Deane & Gaudron JJ).

⁸⁸ *Wik Peoples v Queensland*, above n55 at 182 (Gummow J).

⁸⁹ See Jeremy Webber, ‘Beyond Regret: *Mabo*’s Implications for Australian Constitutionalism’ in Duncan Ivison et al, above n46; Lisa Strelein, ‘Conceptualising Native Title’ (2001) 23 *Syd LR* 95.

⁹⁰ In particular, under ss55–57 of the *Native Title Act* 1993 (Cth), a successful native title claimant group must register as a ‘Prescribed Body Corporate’ to manage its native title interest.

legal rights, the *Native Title Act* established a formal process for claiming these rights. The claims process in the National Native Title Tribunal and the Federal Court is non-Indigenous in design. It constructs land issues as a conflict of rights to be resolved through a process of dispute resolution in courts and tribunals rather than as an issue of governance to be resolved through negotiation.

Although the native title process resulted in a limited recognition of native title rights, the process itself has been remarkable for invigorating Indigenous governance mechanisms. Once the nature and extent of native title rights was clarified by the High Court,⁹¹ agreement making between Indigenous and non-Indigenous groups with an interest in land became the focus of the native title regime. Indigenous Land Use Agreements (hereafter ILUAs) rely on an underlying framework of Indigenous governance. Successful claimants are required to form a corporate entity, a Prescribed Body Corporate (hereafter PBC), to manage their native title.⁹² The PBCs regime has led to a range of issues related to effective Indigenous governance, including whether corporate structures are appropriate structures for Indigenous communities to manage their rights and interests.⁹³ The preparation of claims has required Indigenous communities to reflect on their connections to country, to organise community representation, and to determine the extent of their traditional country in consultation with adjoining communities. This has led to cooperation in the lodging of joint claims,⁹⁴ or on occasions, has provoked intra-Indigenous disputes.⁹⁵

The underlying framework of Indigenous governance that *Mabo* assumes and enlivens is relevant not only to the management of native title, but also to the management of a wide range of other cultural and economic interests in Indigenous communities, and as a basis for negotiating with state and Commonwealth governments over protection and facilitation of these interests. In fact, one of the great hopes for native title is that it will consolidate existing Indigenous governance structures and provide a stronger economic and land base for communities to interact with government institutions and other interest groups in the Australian community.⁹⁶

91 The main cases were *Wik Peoples v Queensland*, above n55; *Fejo v Northern Territory* (1998) 195 CLR 96; *Ward v Western Australia*, above n55; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Yorta Yorta Aboriginal Community v Victoria*, above n22.

92 *Native Title Act* 1993 (Cth) at ss55–57.

93 See generally Christos Mantziaris & David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (2000).

94 For example, the Noongar peoples have registered a joint native title claim over most of the South-West corner of the Western Australian State. National Native Title Tribunal, 'Noongar People Lodge United Native Title Claim in South West WA' Press Release (10 September 2003): <http://www.nntt.gov.au/media/1063172786_2824.html> (15 December 2005).

95 See generally Diane Smith & Julie Finlayson (eds), *Fighting Over Country* (1997).

96 Brennan et al, above n29 at chapter 6.

5. *The Obligation of the State to Facilitate Indigenous Governance*

In the previous section, the reality of Indigenous governance was shown to have been recognised in various ways in Commonwealth and state government law and policy and in the courts. However, the recognition has been piecemeal and reactive, limited to recognising responses to claims of right, or to when governments have tried to determine the best and most efficient model for the allocation of resources. In this section, the article argues that as a matter of political theory, more is required of governments than this reactive approach to recognising Indigenous governance. Although Indigenous governance exists regardless of its official recognition, it remains central to claims for such recognition (just as the different functions of the institutions of government are central to the doctrine of the separation of powers). Furthermore, if the status of Indigenous governance is acknowledged in the formal institutions of government it will eliminate the distracting politics that pits Indigenous and non-Indigenous interests against each other. The focus of policy debate can then be directed to the institutional requirements to allow Indigenous and non-Indigenous interests to co-exist effectively.

A. *Justifications for Formally Recognising Indigenous Governance*

It is common for post-colonial states to recognise Indigenous-specific land, cultural and political rights to some extent.⁹⁷ There are many explanations as to the bases for these rights. One explanation is that the rights derive from the position of Indigenous peoples as the first peoples in the nation. However, priority is an insecure basis for differential rights. There are often good reasons for recognising a more recent interest over an interest established earlier in time. One reason is that a more recent interest is more immediate, direct, and intense, and the person with the interest will suffer the greater harm or injustice from having the interest denied. This is reflected in the legal principle of adverse possession, in which a person's possession or use of land is recognised as a stronger form of right than a prior title to the land. Native title rights are an example of rights which draw their strength from a prior claim of right, but which remain vulnerable to extinguishment by subsequent interests in land. Sovereignty is based solely on the principle of priority. For Kelsen, authority derives from the first law or constitution. It is this justification of sovereignty which makes the claim of exclusive non-Indigenous sovereignty in Australia so weak from an Indigenous perspective. It can only be maintained by denying the existence of prior Indigenous sovereignties.

Another explanation for the basis of Indigenous-specific rights is the inherent difference between Indigenous and non-Indigenous peoples in Australia.⁹⁸ A single law derived from a particular socio-cultural perspective is not able to accommodate the extent of these differences. This argument is vulnerable to the

97 See, for example the United States of America, Canada, South Africa, Norway, and New Zealand.

98 See, for example Iris Young, *Justice and the Politics of Difference* (1990).

fact that differences come and go, and change in nature. There are also powerful reasons in many circumstances to enforce equal rights in the face of an assertion of difference. For example, where an asserted difference is unreasonably harmful to others, there are good reasons for curtailing a person's freedom to exercise the difference. It is not only the *presence* but the *nature* of Indigenous difference that makes it the location of differential rights. Obviously, without difference there is no need for differential rights. But there also needs to be a reason why one person's difference is more worthy of recognition than another person's. In relation to Indigenous difference, Will Kymlicka emphasises the importance of its prior existence.⁹⁹ But as argued above, priority by itself does not provide an adequate basis for differential rights. A better explanation is the deep association of Indigenous peoples with the land. Indigenous difference involves a different way of experiencing the world and of organising a place in it.¹⁰⁰ The engagement of Indigenous Australians with each other and with others is necessarily shaped by this difference.

Another explanation for Indigenous rights is as a response to the perceived historical injustice of Indigenous dispossession in the process of non-Indigenous colonisation. A violation of rights in the past, it is argued, requires reparation in the present.¹⁰¹ The philosopher Jeremy Waldron has argued strongly against this explanation for currently existing rights on the basis that there is a necessary disjuncture between the past and the present. Only present relationships and conditions can determine what is the just reparation for a continuing wrong. If reparation is based on past conditions, it will simply result in harm to people with competing interests in the present.¹⁰² In *Postcolonial Liberalism*, Duncan Ivison argues that Waldron does not fully appreciate the nature of the claim to reparation for past wrongs. The wrong, according to Ivison, is not the denial of specific rights, but a denial of 'just terms of association'. The injustice is the continuing failure to perceive an alternative conception of rights, and their cultural and political expression,¹⁰³ or as this article frames it, a failure to recognise Indigenous governance.

Liberal theorists have traditionally had trouble recognising a plurality of political rights within the state because special rights for one group affect the freedom and equality of others in the same community.¹⁰⁴ However, there is now

99 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995).

100 See, for example Fred Myers, *Pintupi Country, Pintupi Self: Sentiment, Place and Politics Among Western Desert Aborigines* (1986); Deborah Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (1996); Helen Verran, 'Re-imagining Land Ownership in Australia' (1998) 1 *Postcolonial Studies* 237; Stephen Muecke, Kim Benterak & Paddy Roe, *Reading the Country: An Introduction to Nomadology* (1984); Alexander Reilly, 'Cartography, Property and the Aesthetics of Place: Mapping Native Title in Australia' (2004) 34 *Studies in Law, Politics and Society* 221.

101 See generally, Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (2002).

102 Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 *Ethics* 4.

103 Duncan Ivison, *Postcolonial Liberalism* (2002) at 100.

104 For an analysis of the limitations of liberal theory in this regard, see *id* at 14–48.

a body of theory among liberals and communitarians making a strong case for rights to self-government among Indigenous peoples within the nation-state. Kymlicka has argued that recognising special rights for Indigenous peoples is consistent with liberalism because equal participation within a single political community entails a recognition of group difference and cultural affiliations.¹⁰⁵ Expanding the liberal paradigm to acknowledge cultural difference allows citizens a fuller and more equal participation in the political, economic, and cultural life of the state because meaningful decision making derives from a person's particular cultural context.¹⁰⁶ The case for the recognition of Indigenous cultural affiliations is particularly strong. Unlike those who enter a political community from outside, Indigenous peoples have had no choice whether or not to join the political community.¹⁰⁷ Duncan Ivison has extended the recognition of Indigenous political rights within the liberal paradigm still further. In *Postcolonial Liberalism*, Ivison equates the role of participation in the political institutions of society with a sense of 'being at home'.¹⁰⁸ His challenge to liberals is to accommodate complex cultural and political differences within the conception of public reason, so that key liberal values can work for people who have not experienced their benefits. His challenge to non-liberals, including Indigenous peoples who might be sceptical about the role of the state and its institutions, is to trust in the possibility of feeling at home through participation in the political institutions of society despite previous experiences of alienation.¹⁰⁹

Whereas Kymlicka and Ivison take the perspective of the non-Indigenous liberal seeking an ethical engagement with and accommodation of Indigenous peoples, Tully approaches the question of constitutionalism from the perspective of Indigenous peoples. From the Indigenous perspective there is no question of the existence of cultural difference, and the need for political recognition of this difference. It is central to the Indigenous experience of life in the nation.¹¹⁰ From the Indigenous perspective pluralism exists, and the question is why we fail to recognise and protect it. He writes: 'A just form of constitution must begin with the full mutual recognition of the different cultures of its citizens'.¹¹¹ Mutual recognition occurs through dialogue and what emerges are conventions for co-existence rather than comprehensive rules.¹¹²

B. The Role of the State in Recognising Indigenous Governance

Faced with the reality of Indigenous governance and the theoretical case for recognising it within the constitutional order of the state, what is the appropriate way to recognise Indigenous governance? The answer depends on one's

105 Will Kymlicka, *Liberalism, Community and Culture* (1989) at 135.

106 *Id.* at 151–152.

107 Kymlicka, above n99 at 86.

108 Ivison, above n103 at 103.

109 *Id.* at 16–23.

110 See, for example Patrick Dodson, above n68; Mudrooroo, *Us Mob: History, Culture, Struggle: An Introduction to Indigenous Australia* (1995); Alice Nannup, Lauren Marsh & Stephen Kinnane, *When the Pelican Laughed* (1992).

111 James Tully, above n44 at 8.

112 Ivison, above n103 at 80–81.

understanding of the role of the institutions of government in society. Constitutional government can be understood narrowly as a means of curtailing the power of lawmakers. So understood, Parliament should only make laws to maintain order. Broader issues of the relations between cultural groups should be determined outside of the institutions of government. If one conceives of constitutional government in this way, the role of representatives might be limited to a narrow range of decisions that affect all citizens equally, and might not include the determination of questions of culture, identity or social diversity. In such a government, recognising differential rights, and providing for the protection and facilitation of autonomous self-governing groups is unlikely to be perceived as the role of the state. This is so regardless of the strength of a group's identity and the degree of their difference, and regardless of the ethical and political force of their claims to self-governance. Only if there were some constitutional *requirement* for recognition would there be any obligation to recognise governance mechanisms outside those established by the state. This narrow understanding of constitutional government emerges from the work of Thomas Hobbes and John Locke among others.¹¹³ It dominated the formation of Australian political institutions at the time of federation, and resulted in a Constitution with no substantive recognition of Aboriginal people and their rights. It is also highly influential on the present Government's Indigenous policy.

Alternatively, constitutions can be viewed as a means of empowering representatives to improve society through the institutions of government. This requires a more active and interventionist role for government in the shaping of society, and more creative approaches to law making. If one understands constitutional government to be the location for the determination of questions of culture and rights, there is an incentive to investigate any means by which existing institutions, such as parliament, can better conduct and manage these debates and contests. With this understanding of constitutional government, any means by which consideration of questions of culture and rights can be improved will be embraced. The broader understanding of constitutional government is linked to a rejuvenation of the concept of politics among theorists reflecting on questions of diversity within liberal political institutions, such as Kymlicka,¹¹⁴ Iris Young,¹¹⁵ and Anne Phillips,¹¹⁶ and in work reflecting on the political theory of Carl Schmitt.¹¹⁷

This broader understanding of constitutional government suggests the state ought to take positive steps to facilitate Indigenous governance. Although it is likely to be Indigenous Australians who lead the case for the recognition of Indigenous governance, the whole of the political community will determine the

113 See Thomas Hobbes, *Leviathan* (1996); John Locke, *Two Treatise of Government* (1988).

114 Kymlicka, above n99; above n105.

115 Iris Young, above n98.

116 Anne Phillips, *Politics of Presence* (1995).

117 A body of literature has recently picked up on the work of Carl Schmitt arguing for a return to the political, by which is meant, the return of more radical and conflicting ideas in political discussion. See for example, Chantal Mouffe, *Democratic Paradox* (2000); John McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (1997); Jacques Derrida, *Politics of Friendship* (1997).

nature and shape of any official recognition. Therefore, in discussing the merits of Indigenous institutions of self-government, there must be a focus on how it can work within the constitutional framework of government for all Australians. The Federal Government's recognition of its responsibility for the maintenance of Indigenous communities and institutions is evident in its continued support for the native title regime, and other legislative schemes aimed at protecting the rights of Indigenous peoples. It is also evident in the assumptions about the existence of Indigenous self-governing communities in the Federal Government's current policy for providing services to Indigenous communities. The Federal Government's current policy may differ from the approach under the *ATSIC Act* in its method of recognising, supporting, and enhancing Indigenous governance, but not in its reliance on Indigenous governance for the effective implementation of its policy. In the last section, the article identifies a number of issues for which the state must take some responsibility to ensure the effective exercise of Indigenous governance, and ultimately, to ensure the success of any policy aimed at the economic and cultural well-being of Indigenous communities in Australia.

6. Key Issues in the Recognition of Indigenous Governance

Most claims for the recognition of Indigenous interests, be it sovereignty, self-determination, rights to land, or the protection of other socio-economic or cultural rights, seek entrenchment of the interests in a formal instrument of government. The benefit of such formal recognition is that the interests are then protected by the law. In relation to Indigenous governance, there are several problems with such formal recognition. First, as discussed above, recognition in a non-Indigenous instrument of government is in conflict with the degree of independence inherent in the concept of Indigenous governance. Second, Indigenous governance defies simple definition. The requirements of Indigenous governance differ in different contexts and at different levels. At the level of the community, Indigenous governance might require a recognition of customary law and customary decision making processes. At the level of the nation, it may require the recognition of Indigenous administrative structures to determine questions such as membership or resource allocation.

This article has argued that there needs to be a conceptual shift in how we understand the constitutional framework of government. Fundamental to that shift is an understanding that Indigenous governance exists and is practiced at various levels in the Australian polity. With this shift comes a recognition that the formal institutions of the state already accommodate Indigenous governance in various forms, albeit implicitly. If this shift in understanding occurs, there can be a renewed focus on the practical steps that need to be taken to assist Indigenous communities in Australia. There is nothing wrong with the Federal Government's focus on 'practical reconciliation' per se, what makes it objectionable is that it imposes policy responses that react to a problem constructed as one of Indigenous 'disadvantage'. The concept of disadvantage reduces the difference of Indigenous Australians to a matter of economics, and reduces the solution to effective mainstream resource allocation.

The Commonwealth's current Indigenous policy avoids any mention of Indigenous governance. Indigenous involvement on the ground is framed as purely administrative, through Indigenous Coordination Centres. Established as administrative bodies, these Centres remain undefined in terms of their membership and their decision making functions. Once they are recognised for what they surely must be, instruments of Indigenous governance, a number of issues about their constitution and role must be confronted: how is their membership determined? What is the extent of their control and decision-making power over the resources allocated to Indigenous programs? How are they to be held accountable for decisions they make, and to whom are they accountable? In this last section, the article explains how these questions are of fundamental importance to any Indigenous policy that properly accounts for Indigenous governance.

A. Determination of Membership of Indigenous Communities

Paradoxically, if the Government takes seriously the need to recognise and facilitate Indigenous governance, it will want a stake in the criteria for membership in Indigenous communities. The paradox arises because taking Indigenous governance seriously requires giving up a certain amount of decision making power over the provision of resources and services. Since resources are limited, and the government is obliged to provide for all its citizens, a government will only be prepared to relinquish some control over resources if it is confident that the power will go into the right hands.

Membership of the Australian community at the levels of the Commonwealth and the states is defined by the entitlement to participate in rights associated with community membership, and most importantly, by the right to vote. The right to vote is granted, first, as a consequence of membership of the Australian community,¹¹⁸ and second, as a consequence of having an identified place of residence in Australia.¹¹⁹ Other rights to inclusion are often derivative of the right to vote. For example, to obtain a driver's licence in NSW, a person requires evidence of their residential address and an important source of evidence of a person's address is their inclusion on the electoral roll.¹²⁰ The criteria for membership in Indigenous communities are distinct from the criteria for membership of the Australian community. Most Indigenous Australians no longer live on their traditional lands and have no clear geographical or regional distinction from non-Indigenous people. Membership is primarily a question of identity. One of the major constitutional challenges in relation to Indigenous governance is to

118 Membership is defined in terms of 'citizenship'. See *Commonwealth Electoral Act 1918* (Cth) s99A.

119 See, for example *Parliamentary Electorates and Elections Act 1912* (Cth), Part III 'Qualification of Electors'; *Commonwealth Electoral Act 1918* (Cth), Part VII. There is a special provision for 'itinerant electors' in the *Commonwealth Electoral Act* who can apply to be on the electoral roll in a particular state despite not satisfying the residence requirement. See *Commonwealth Electoral Act 1918* (Cth), s96.

120 Road Transport (Driver Licensing) Regulation 1999 (NSW) s16(1)(b).

establish criteria for Indigenous identity. Using native title as an example, a person can have native title rights through association with a community regardless of his or her own personal disconnection from land. In *Mabo*, Brennan J stated:

[S]o long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.¹²¹

In *Ward v Western Australia*, the Full Court of the Federal Court held that people could be adopted into or ‘grown up’ in communities and still be part of the community for the purposes of determining native title rights.¹²²

At the national level, Indigenous peoples also express a ‘national’ identity, which distinguishes them as a group from other groups in the nation. Most broadly conceived, Indigenous national identity is based on a common experience of being colonised peoples. Indigenous national identity is formally recognised in several instruments of the state, among others: until 1967, in s51(xxvi) of the Constitution; in the *Native Title Act* 1993 (Cth), the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth), the *ATSIC Act* 2005 (Cth) (hereafter *ATSIC Act*). The most comprehensive formal expression of the national identity of Indigenous Australians was of course the *ATSIC Act* which was in place from 1989–2005, and established an electoral process for choosing Indigenous leaders at the national level. The Federal Government’s current Indigenous policy recognises a national Indigenous political identity in the National Indigenous Council.

There are two related issues surrounding the determination of Indigenous identity for the purpose of determining inclusion within Indigenous communities; first, the respective roles of the state and Commonwealth governments and Indigenous communities themselves in determining the criteria for Indigenous identity, and second, who should resolve cases of disputed identity, institutions of the state or the community?

In the 1990s there were two challenges to the eligibility of people running for office in ATSIC regional council elections, and the Federal Court was called upon to consider who satisfied this definition.¹²³ In both cases, a petition was presented under clause 2 of schedule 4 of the *ATSIC Act* seeking declarations that the respondents were not qualified to run for election and therefore not eligible to be elected to a Regional Council established by the *ATSIC Act* because none of them was an satisfied the definition of ‘Aboriginal person’ under the *ATSIC Act*. The Federal Court found itself in the position of having to determine who was an ‘Aboriginal person’ under the Act because the question of identity was raised in relation to the statutory right. In *Shaw v Wolf*, Merkel J agreed with Drummond J

121 *Mabo*, above n21 at 61.

122 *Western Australia v Ward*, above n55 at 379 (Beaumont & von Doussa JJ).

123 *Shaw v Wolf* (1998) 83 FCR 113; *Gibbs v Capewell*, *Australian Electoral Commission and Minister for Aboriginal and Islander Affairs* (1995) 128 ALR 577.

in *Gibbs v Capewell*¹²⁴ that there were three aspects to the definition of an Aboriginal person: descent from peoples of the Aboriginal race, self-identification as Aboriginal, and community recognition.¹²⁵ Merkel J was at pains to give a broad meaning to descent; one that recognised that sociological context had a significant influence on self-identification and on community recognition in the determination of descent, and did not rely on biology or genetics alone. Nonetheless, it would seem impossible for identity to be completely divorced from a concept of genealogical or biological descent in the context of Commonwealth legislation relating to Aboriginal peoples, since the Commonwealth power to make laws for Aboriginal Australians is itself based squarely on the concept of racial difference.¹²⁶ In *Commonwealth v Tasmania*, Brennan J recognised that in the concept of race, the role of biology was open to question. However, he concluded that it remained a key characteristic in racial categorisation.¹²⁷

The role of race is reinforced at the Commonwealth level by the fact that the constitutional power to make laws with respect to Indigenous Australians is on the basis of race. This risks reducing Indigenous difference to an issue of biology, ignoring the substantive differences of culture and political expression.¹²⁸ This may be a constraint on the capacity of the Commonwealth Constitution to support an effective legislative regime for Indigenous governance, for it means that the Commonwealth is limited to policy initiatives based on the concept of racial difference. Although within this category of difference the Commonwealth has broad scope for policy making, it is uncertain whether it could legislate for an Aboriginal people defined in broader terms than that of race under s51(xxvi) of the Constitution. More importantly, the existence of race as the discriminator between Indigenous and non-Indigenous Australians pre-judges and limits the complex issue of identity.

B. Mechanisms for Accountability and Dispute Resolution

The fact that non-Indigenous governments have a stake in issues relating to Indigenous governance carries with it the responsibility to ensure that there are adequate mechanisms for the resolution of disputes. Currently, the non-Indigenous courts are the only bodies established to fulfil this role. On many issues, however, the courts are not an appropriate body to resolve disputes on issues relating to Indigenous governance. For example, the use of courts to make decisions about inclusion in Indigenous communities raises obvious problems of legitimacy. Justice Merkel of the Federal Court raised such concerns in *Shaw v Wolf*.¹²⁹ While

124 Ibid.

125 *Shaw v Wolf*, above n123 at 117–122.

126 Commonwealth Constitution s51(xxvi).

127 See Brennan J in *Commonwealth v Tasmania* (1983) 158 CLR 1 at 253: ‘“Race” is not a term of art; it is not a precise concept: see *Ealing London Borough Council v Race Relations Board* per (Lord Simon of Glaisdale). There is, of course, a biological element in the concept. The UNESCO studies on race and racial discrimination reveal some difficulty in giving a precise definition even to this element.’

128 See Loretta De Plevitz & Larry Croft, ‘Aboriginality Under the Microscope: The Biological Descent Test in Australian Law’ (2003) 3 *QUTLJT* 104.

129 *Shaw v Wolf*, above n123.

recognising the Court's obligation to determine the question of eligibility to run for ATSIC elections, Merkel J was clearly uncomfortable with his role in determining a question which was at the heart of Aboriginal self-identity and self-government. Merkel J concluded his judgment with the observation that:

It is unfortunate that the determination of a person's Aboriginal identity, a highly personal matter, has been left by a Parliament that is not representative of Aboriginal people to be determined by a Court which is also not representative of Aboriginal people. Whilst many would say that this is an inevitable incident of political and legal life in Australia, I do not accept that that must always be necessarily so. It is to be hoped that one day if questions such as those that have arisen in the present case are again required to be determined that that determination might be made by independently constituted bodies or tribunals which are representative of Aboriginal people.¹³⁰

One of the lessons from *Shaw v Wolf* is that when Indigenous governance is formally recognised in legislation, there is a greater likelihood that the state will be involved in determinations of questions of community membership, culture, and rights. This is an important consideration when determining the extent of state recognition and protection of Indigenous governance. If legislation were considered to establish a regional framework for Indigenous governance, serious consideration should also be given to establishing an independently constituted Indigenous body for the resolution of disputes arising under that act. This is particularly the case for issues relating to membership of the community and interpretation of customary law. In creating such a body, it is necessary to balance the needs of the community and the needs of the state in the resolution procedures. Among other things, the state retains an overarching obligation to protect the interests of those affected by Indigenous rights, and more generally, an obligation to protect the human rights of all people in the community. Also, there is a need to determine the grounds for appealing or reviewing the decisions of the Indigenous dispute resolution body to state or federal courts.

C. Control of Resources

In 2001, the Acting Minister for Finance and Administration, Senator Rod Kemp, commissioned the Commonwealth Grants Commission (hereafter CGC) to develop methods of calculating the relative needs of Indigenous Australians in different regions for the purpose of determining the allocation of Commonwealth funds to Indigenous and mainstream programs. The Terms of Reference of the inquiry sought a funding model that could be used to determine the relative need of Indigenous peoples in different regions, based purely on levels of disadvantage, and without any recognition of Indigenous governance. The data relied on was largely statistical information (from the 1996 Census data) and not information from Indigenous communities. Not surprisingly, the Commission concluded that 'it was difficult to construct suitable regional indexes because the available data

¹³⁰ Id at 137.

was not comprehensive and up-to-date'.¹³¹ It also found that mainstream services were not widely accessed by Indigenous Australians and did not meet their needs.¹³²

If the funding needs of Indigenous communities is understood not only to be a response to mainstream disadvantage, and the determination of need is understood not only to be the responsibility of mainstream governments, but of mainstream governments in partnership with Indigenous communities, new approaches to addressing Indigenous financial needs emerge. In fact, in its analysis, the CGC understood the importance of Indigenous governance without naming it as such. In its conclusions, it discussed the need to 'recognise the importance of capacity building within Indigenous communities', and the need to establish 'effective partnerships between service providers and Indigenous people'.¹³³

Clearly, a degree of financial independence is necessary for effective Indigenous governance. The greater reliance Indigenous communities have on government financial assistance, the less autonomous they will be. The changing relationship between the Commonwealth and the states in Australia demonstrates the importance of financial independence for effective governance. As a result of an imbalance in the financial relations between the Commonwealth and the states, the states are subordinate both in terms of the ambition they can bring to their legislative programs, and in terms of their ability to bargain with the Commonwealth over the terms and conditions of programs which are within the control of both the Commonwealth and the states.¹³⁴ Aboriginal communities are highly dependent on Commonwealth and state funding. This puts them in a weak institutional position and hampers effective Indigenous governance.

Government funding for Indigenous programs comes from several sources: mainstream Commonwealth and state government department funding; Commonwealth specific purpose payments to fund Commonwealth programs;¹³⁵ and state and local government funding for Indigenous-specific programs. Under the constitutions of the Commonwealth and the states funding for Indigenous programs must be made out of the Consolidated Revenue Fund. There is a wide power of appropriation at both the Commonwealth and state levels for this purpose.¹³⁶ The constitutional categorisation of Indigenous people according to race under s51(xxvi) may limit the amount of control that can be ceded to Indigenous communities over money appropriated for Indigenous programs. In particular, the Commonwealth may not be able to allocate money to Indigenous communities for purposes that are not Indigenous-specific, such as funding a local organisation which is defined in terms of its location rather than the identity of its constituents.

131 Commonwealth Grants Commission, *Report on Indigenous Funding 2001* (2001) at xv.

132 *Id* at xv.

133 *Id* at xviii.

134 Mathews, above n40.

135 ATSIC programs fell into this category of funding.

136 Commonwealth Constitution s81. See *Combet v Commonwealth* (2005) 221 ALR 621; *Attorney General Victoria: Ex rel Dale v Commonwealth* (1945) 71 CLR 237.

ATSIC was often the target of criticism about the failure of Indigenous policy at the national level. There was a general perception that a great deal of money was devoted to Indigenous-specific programs under ATSIC's control, without adequate results. In fact, a majority of ATSIC's budget was allocated directly to established programs with no discretion in the Commission in relation to the allocation. Also, of the funds that the Commission controlled, most was allocated to agencies established under other legislative schemes with their own regulatory authorities responsible for ensuring that organisations met their statutory obligations such as community councils, medical services, legal services, housing co-ops, and social, cultural and sporting bodies.¹³⁷ Spending by ATSIC was subject to the usual processes of accountability that apply to public sector spending: senate estimates, scrutiny of the auditor general, and parliamentary committees. In addition, ATSIC was subject to review by the Office of Evaluation and Audit (hereafter OEA), an independent statutory body established under Part 4B of the *ATSIC Act* 1989 (and continues under the *ATSI Act* 2005), to report directly to the Minister on spending on Indigenous programs. In 1996, the Commonwealth appointed a Special Auditor to examine the financial documentation of ATSIC-funded Indigenous organisations.¹³⁸ The Australian National Audit Office commented that 'no other Commonwealth agency has a position equivalent to the Director of OEA ... and with such strong independent reporting powers'.¹³⁹ Despite the level of scrutiny of ATSIC spending and a reasonably positive report from the Australian National Audit Office, criticisms of ATSIC spending remained until its demise.

An obvious lesson from the ATSIC experience for future Indigenous governance initiatives is the need to have clear lines of responsibility for servicing Indigenous programs. The size of the ATSIC budget suggested that it carried greater responsibility for the provision of basic services to Indigenous communities than was actually the case. In future, Indigenous Australians might be well advised to accept responsibility only for discretionary funding that is allocated to them, and leave non-discretionary funding to be made through mainstream government departments.

There is a considerable literature on the importance of land for Indigenous rights and economic development in Australia.¹⁴⁰ Since the 1970s, state and territory land rights legislation has been responsible for the return of vast areas of land to Indigenous community ownership.¹⁴¹ This land has created an important

137 *ATSIC, As a Matter of Fact*, above n61 at 20.

138 The audit cleared 95 per cent of organisations for further funding. Where there were problems, it was generally the lack of experience in managing finance, and the size of the organisations that was the cause. *Ibid.*

139 *Id* at 26.

140 Larissa Behrendt, 'Indigenous Self-determination : Rethinking the Relationship Between Rights and Economic Development' (2001) 24 *UNSWLJ* 850; Sean Sexton, 'Law, Empowerment and Economic Rationalism' (1996) 3 *Aboriginal Law Bulletin* 12; Jo Altman, 'Economic Development and Indigenous Australia: Contestations over Property, Institutions and Ideology': <http://www.anu.edu.au/caepr/Publications/topical/Altman_Economic_Development_2004.pdf> (15 December 2005).

economic and cultural foundation for Indigenous communities. For example, the NSW Aboriginal Land Council (hereafter NSWALC) buys, manages and invests in land for Aboriginal people. It has made purchases of land worth in excess of \$1 billion, and has a self-sustaining land fund for further purchases, and for the administration of land on behalf of local communities in NSW. Unlike ATSIC, the NSWALC does not rely on an appropriation from consolidated revenue, and thus has been able to maintain a greater level of autonomy than ATSIC from the influence of Commonwealth and state governments.¹⁴²

Despite the success of statutory bodies such as the NSWALC, attempts to increase the economic self-sufficiency of Indigenous communities have not broken the considerable reliance of communities on state and Commonwealth financial support. It was hoped that the recognition of native title in *Mabo* might provide a new economic base for Indigenous communities from which they could negotiate the terms of non-Indigenous use of native title land.¹⁴³ However, much of this economic potential has been lost due to the interpretation of the nature and strength of native title rights in comparison with other rights to the land.¹⁴⁴ For example, the High Court has limited the potential to claim native title rights over minerals.¹⁴⁵ It is because Indigenous communities remain heavily reliant on Commonwealth and state funding that legal protection of their autonomous existence in Commonwealth and state laws and/or constitutions remains an important focus of those advocating for Indigenous rights.

7. Conclusion

Since, as this article has argued, Indigenous governance is part of Australia's constitutional framework, mainstream governments must account for it in their relations with Indigenous Australians. There is good sense in formally recognising and facilitating Indigenous governance in the Commonwealth Constitution so that law and policy is targeted appropriately at the points of contact between the different types and levels of government in Australia. Regardless of any formal recognition, Indigenous policy in Australia will be more successful if it

141 See generally, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Pitjantjatjara Land Rights Act 1981* (SA); *Maralinga Tjarutja Land Rights Act 1984* (SA); *Aboriginal Land Rights Act 1983* (NSW); *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth); *Aboriginal Land Act 1970* (Vic); *Aboriginal Land Act 1991* (Qld); *Aboriginal Lands Act 1995* (Tas).

142 For a discussion of lands rights administration in New South Wales, including the role of the NSWALC, see Linda Pearson, 'Aboriginal Land Rights Legislation in New South Wales' (1993) 10 *Environmental and Planning Law Journal* 398; Meredith Wilkie, *Aboriginal Land Rights in NSW* (1985).

143 See for example, Richard Bartlett, 'The Proprietary Nature of Native Title' (1998) 6 *APLJ* 77; Noel Pearson, 'From Remnant Title to Social Justice' (1993) 65(4) *Aust Q* 179; Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Syd LR* 95.

144 See generally, *Fejo v Northern Territory*, above n91; *Ward v Western Australia*, above n55; *Commonwealth v Yarmirr*, above n91; *Yorta Yorta Aboriginal Community v Victoria*, above n22.

145 *Ward v Western Australia*, above n55 at 184–5 (Gleeson CJ, Gaudron, Gummow & Hayne JJ), 244–245 (Kirby J).

acknowledges the importance of Indigenous governance to the proper functioning of Indigenous communities. If the Federal Government is committed to the social, cultural and economic well-being of Indigenous Australians, it must be drawn on the governance practices of Indigenous communities as a central source of knowledge on what is the nature and extent of Indigenous need. This article has argued that the recognition of Indigenous governance is necessary not only to maximise Indigenous policy outcomes, but also to establish healthy and sustainable constitutional arrangements.

The Australian constitutional order is well positioned for the type of recognition of Indigenous governance called for here. The Commonwealth Constitution already shares the power to govern between two levels of government. Although there are, and will always be, difficult issues in relation to the effective division of responsibilities and allocation of resources between the levels of government, the unequivocal position of the Commonwealth and the states as governing entities means that they have no choice but to negotiate with each other on these questions. The recent experience of Australian federalism has been marked by an increased emphasis on cooperation between Commonwealth and state governments. A new federalism in the relationship between Indigenous communities and state and Commonwealth governments could benefit from the experience of the State/Commonwealth federal relationship.

There is uncertainty at the heart of the Government's current Indigenous policy. On the one hand, the government is promoting a system of agreement making with Indigenous communities and even with groups of communities within a region, but on the other hand, it is not recognising the role of Indigenous governance in this agreement making process. Whatever its faults, ATSIC contained the core attributes necessary for a framework of Indigenous governance. The demise of ATSIC has given way to a new philosophy which sees governance as a distraction from successfully providing resources to Indigenous communities. This new approach seems certain to fail unless adequate support is provided to facilitate the governance capabilities of the Indigenous communities with which the government enters into agreements. Ultimately, 'Shared Responsibility Agreements' or 'Regional Partnership Agreements' are only as strong as the framework of governance which supports them.

